No. 80-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

vs.

RICHARD L. INGLE,
Respondent.

PETITIONER'S REPLY BRIEF
In Support of Its Petition for a Writ of Certiorari

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The Brief for Respondent in Opposition may create confusion and misapprehension as to certain of the facts and issues involved in the Petition for Writ of Certiorari in this case. For this reason it is necessary to submit this Reply Brief.

Before undertaking a general analysis of Respondent's Brief in Opposition, certain specific items must be addressed. Respondent has seen fit to restate the Question Presented in a rambling and seemingly endless sentence, apparently attempting to distinguish the particular facts of *Ingle* v. *Illinois Central*

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[1] A listing of all related corporations was included in footnote 1 of the Petition For Writ of Certiorari.

Gulf Railroad Company, 603 S.W.2d 32 (Mo. App. 1980) from the particular facts of *Norfolk & Western Railway Company* v. *Liepelt,* 404 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); reh. den. ____ U.S. ____ ,100 S.Ct. 1667, 64 L.Ed.2d 250 (1980). The seven or eight particular characteristics of the *Ingle* case listed are for the most part irrelevant to the real issue before this Court. Furthermore, they are not all accurate statements. For example, the record does present more than the issue of the trial court's response to the jury's question, because an instruction was requested by petitioner and refused; and the petitioner did indeed have a point on appeal asserting that the trial court's refusal to instruct on the income taxation issue resulted in the jury prejudicially inflating the size of the verdict. Respondent's Question Presented also characterizes a reversal based on *Liepelt's* retroactive application as "arbitrary". The only logical inference to be drawn from this is that respondent considers the decision of this Court in *Liepelt* as well as all the post-*Liepelt* decisions mentioned in the Petition for Certiorari to likewise involve "arbitrary" reversals.

Respondent asserts that petitioner's Statement of the Case is not "fair and concise". A quick review of this Statement of the Case will reveal that it is less than one page in length and is composed mainly of chronological narrative plainly presented without argument. Given this brevity it seems obvious that respondent could easily correct any misstatements contained therein. Instead, respondent does not even attempt to explain what is wrong with the statement. We feel respondent's sole motivation for such unfounded criticism is an attempt to unjustly discredcit petitioner in the eyes of this Court, and not to assist this Court in assessing the merits of this application for certiorari.

Concededly, the issue here is a narrow one - whether *Liepelt* must be applied retroactively and uniformly to a similar case pending on direct appeal. But the *Ingle* case is not the sole case

involved here, nor is the number of cases involved "extremely limited" as respondent asserts on page 4 of his brief. We note respondent's failure to comment on the three similar cases pending in Missouri. As respondent's counsel is also counsel of record for each of these three cases, his failure to mention or discuss these cases may be viewed as a concession as to the accuracy of petitioner's statements regarding them. Obviously, it is extremely difficult to put a number on how many other cases there might be in this same procedural status in Missouri, let alone all the other state and federal jurisdictions. If each such jurisdiction had only three, then at least one hundred fifty cases would be involved. Perhaps Liepelt's counsel was closer to the mark when he stated on page seven of Liepelt's Petition for Rehearing filed with the United States Supreme Court that there would be "hundreds, if not thousands," of such cases.

A misleading aspect of respondent's brief is his continual assertion that petitioner, the defendant railroad, never contended on appeal that the damages awarded were "excessive". In fact, the main thrust of respondent's argument is simply that petitioner was not prejudiced by the trial court's refusal to give the instruction. Unfortunately, the *Ingle* court appears to have been confused by this "excessiveness" issue. Respondent seeks to foster that same confusion in this Court. When properly analyzed, it is clear: (1) that the jury asked the court for legal guidance as to the effect of income taxation on the verdict; (2) in response to this inquiry the petitioner requested a proper instruction on taxation; (3) that the trial court refused; (4) that petitioner preserved and argued this error all the way through the appeal; and (5) that petitioner was prejudiced by the refusal of the instruction.

In order to clear the muddied waters, reference should be made to petitioner's brief on appeal in the Missouri Court of Appeals. Amended Point IV of petitioner-defendant's brief dealt with the issue and stated:

> "After the jury had specifically requested information with regard to the effect of taxes on the verdict, the trial court erred in refusing defendant's request that the jury be instructed as to the applicable law that a verdict for plaintiff was not subject to any federal or state income taxes, because defendant is entitled to instructions on the law applicable to the jury's verdict and *the failure to give such instruction resulted in the jury inflating the size of the verdict to take into account the question of taxation.*" (emphasis added).

The first paragraph under the above Point of petitioner-defendant's brief states:

> "Although the defendant has not raised the issue of excessiveness in order to request a remittitur to this court, defendant submits that the amount of the verdict has been inflated because of the judge's refusal to properly respond to this question of the jury and defendant has been prejudiced thereby."

Petitioner's decision not to request a remittitur was predicated upon the deliberate and obvious retreat by the Missouri appellate courts from the application of the doctrine of remittitur and their trend towards letting the jury's award stand. The court's philosophy on this doctrine is perhaps best stated in *Koehler* v. *Burlington Northern, Inc.* 573 S.W.2d 938 (Mo. App. 1978):

> "The purpose of a doctrine of remittitur is to prevent awards from *exceeding the upper limits of fair and reasonable compensation.* (l.c. 945)...We will not order a reduction of the verdict unless as *a matter of law it is excessive.* It must be so grossly excessive that it *shocks the conscience of this court* and convinces us that *both the jury and the trial court abused their discretion*....We will exercise our power to interfere with their judgment with caution and *only when the verdict is manifestly unjust.*" (l.c. 946.) (emphasis added).

Keeping in mind that the term "excessiveness" is equated with a verdict so large that it "shocks the conscience of the court" or is "manifestly unjust" and mi· dful of the Missouri appellate court's repeated recent decisions refusing to exercise the doctrine of remittitur, petitioner did not request remittitur. In this sense, and in this sense only, petitioner did not argue that the verdict was "excessive".

Towards the bottom of page 5 of his brief, respondent attempts to inject a false issue into this case by claiming that petitioner's failure to raise "excessiveness" as a separate point on appeal fails to preserve the prejudicial effect of the alleged error, citing *Meyers* vs. *Bi-State Development Agency,* 567 S.W.2d 638, 643 (Mo. Banc 1978). This is a misrepresentation of Missouri law, as seen by reference to footnote 1 of the *Meyers* case which states "point that verdict was excessive *not* needed if error relates to instructions on damages..." (1.c. pg. 643). Understandably, the Missouri Court of Appeals ignored this same argument which respondent had made before it on appeal.

The importance of the distinction between "excessiveness" and "inflation" of the award based on an improper instruction is perhaps best set out in the *Liepelt* case itself. Respondent seeks to distinguish *Ingle* and *Liepelt* by arguing that damages in *Liepelt* were "obviously and grossly excessive", (pg. 5), and that the court in *Liepelt* was "obviously motivated by the extreme excessiveness of the damages awarded in that case." (pg. 16). All this emphasis on the excessiveness of the *Liepelt* damage award is misplaced. In fact, the Illinois Appellate Court specifically ruled that the amount of damages awarded in *Liepelt* was *not* "excessive". *Liepelt* v. *Norfolk & Western Railroad Company,* 62 Ill. App. 3d 653, 378 N.E.2d 1232 (Ill. App. 1978).

A proper reading of the *Liepelt* decision will clarify the fact that it was not predicated upon the finding of excessiveness of the verdict. This Court states in *Liepelt:*

> "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. *Whether or not this speculation is accurate,* we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,
>
> 'To put the matter simply, giving the instruction can do no harm, and it can certainly help by *preventing the jury from inflating the award and thus overcompensating* the plaintiff on the basis of an erroneous assumption that the judgment will be taxable....' " 63 L.Ed.2d at 696. (emphasis added).

Therefore, petitioner's emphasis in its prior briefs on the prejudice from the "inflation" of the verdict as opposed to arguing "excessiveness" for the purposes of remittitur was prophetic of the very decision of the United States Supreme Court in *Liepelt,* which itself emphasized the danger of "inflation" of the verdict as opposed to requiring the finding of "excessiveness" of the damages.

Point II of Respondent's Brief, covering pages 7 to 25 , concerns the ultimate merits of the issue involved herein. The proper place for such extended argument is of course in the briefs on the merits, should the writ be granted. However, petitioner is not unmindful of Supreme Court Rule 23.1, allowing summary disposition on the merits after the petition and reply have been filed. A short response must therefore be made.

Respondent's aguments on the merits of the *Ingle* decision utterly fail to justify the fact that *Ingle* is in conflict with three United States Circuit Courts of Appeals and two state appellate courts. In fact, all reported decisions on the issue have ruled contrary to *Ingle* and held that *Liepelt* must be applied retroactively to a case on direct review. *Cazad* v. *Chesapeake & Ohio Railway Co.,* 622 F.2d 72 (4th Cir. 1980); *Lang* v. *Texas & Pacific Railway Co.,* 624 F.2d 1275 (5th Cir. 1980); *O'Byrne* v.

St. Louis Southwestern Railway Co., 632 F.2d 1285 (5th Cir. 1980); *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (6th Cir. 1980); *Seaboard Coast Line Railroad Co.*, v. *Yow*, 384 So.2d 13 (Ala. 1980); *Oltersdorf* v. *Chesapeake & Ohio Railroad Co.*, 83 Ill.App.3d 395, 404 N.E.2d 320 (Ill.App. 1980); *Crabtree* v. *St. Louis-San Fancisco Railway Co.*, 411 N.E.2d 19 (Ill.App. 1980).

The decisions in those cases ably refute all the arguments of respondent herein. In fact, two of those cases decided after *Ingle* actually discuss the *Ingle* opinion and find it to be wrongly decided, *Flanigan* v. *Burlington Northern, Inc., supra, and Crabtree* v. *St. Louis-San Francisco Railway Co., supra.*

Respondent also details the personal injuries involved in the case and laments the hardship that a new trial would involve. Perhaps this is best put into perspective by the recent decision in *O'Byrne* v. *St. Louis Southwestern Railway Co.*, 632 F2d 1285 (5th Cir. 1980). There the court ruled both that *Liepelt* must be given retroactive effect and that *Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instuction. In discussing its reversal based upon the retroactive application of *Liepelt,* the court stated:

> " 'We do not find that retroactive application of *Liepelt* to this case will result in "manifest injustice." ' *Lang, supra,* at 1280. And here, as there, plaintiff is not deprived of the right to a just and adequate recovery; he is simply compelled to establish it under proper jury instruction". 632 F.2d at 1287.

Furthermore, as noted in *Crabtree* v. *St. Louis-San Francisco Railway Co., supra,* most of respondent's arguments for the prospective effect of *Liepelt* have already been presented to this Court in Liepelt's own Petition for Rehearing. That petition was denied April 14, 1980 (____ U.S. ____ ,100 S.Ct. 1667, 64 L.Ed.2d 250).

Petitioner is prejudiced by the *Ingle* decision, which has been wrongfully decided and conflicts with every other reported decision on the issue. Unless this Court corrects the *Ingle* decision through granting this Petition for Writ of Certiorari, an imminent danger lies ahead that countless other cases will be wrongly decided on the basis of *Ingle*. Leaving the retroactive application of *Liepelt* to the discretion of all the lower courts would involve confusion and a threat to the ordered administration of justice. This is especially true since this case is brought under the FELA, the purpose of which is to provide a uniform body of substantive law to be applied in federal and state courts alike for the mutual benfit of the railroads and their employees.

It is again respectfully submitted that because of the clear-cut conflict on the question of the retroactive application of the *Liepelt* decision and because of the developing probability of non-uniform application of the *Liepelt* decision, both of which questions are of great importance to the nation's railroad industry, the within Petition for Writ of Certiorari should be granted so that the decision of the Missouri Court of Appeals, Eastern District, can be reviewed and proper guidance provided by this Court on these questions.

Respectfully submitted,

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